

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBERS 96-0477, 96-0478 & 96-0413
SALES TAX and WITHHOLDING TAX
For Tax Periods: 1992-1995**

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Issues

I. Sales and Withholding Tax – Best Information Available Assessment

Authority: IC § 6-8.1-5-4; *Howland v. Indiana Department of Revenue*, Indiana Tax Court, 49T10-9611-TA-168, June 19, 2003

The taxpayer protests the Department's computation of tax due based on available records.

II. Sales and Withholding Tax – Validity of Extension Agreement

Authority: *Indiana Supreme Court D&M Healthcare, Inc. et al., v. Joseph E. Kernan, in his official capacity as Governor of the State of Indiana, et al.*; Indiana Supreme Court, 49S05-0310-CV-437, December 17, 2003

The taxpayer protests that an agreement to extend time for the audit was invalid.

Statement of Facts

The taxpayers (hereinafter taxpayer) are 3 separate business entities operated by the same individual and selling and installing satellite dish systems throughout the audit period. Audits of each of these entities resulted in assessments for under payment of sales and use tax. One of the issues raised in the taxpayer's protest was the assessment of sales tax on labor charges for the satellite dish system installation. By mutual agreement, taxpayer and Department deferred the hearing on this assessment until the *Howland* case (*Howland v. Indiana Department of Revenue*, Indiana Tax Court, 49T10-9611-TA-168, June 19, 2003) was resolved by the tax court, agreeing at the time that the resolution of the *Howland* case would be dispositive of this issue. The *Howland* case was decided by the Indiana Tax Court in June of 2003 and taxpayers and Department held a hearing on the remaining issues, related to the assessment based on best information available and a question as to the validity of an extension of time for the 1992 audit.

The hearing was held and final documents for Departmental review were submitted on February 16th, 2004. This letter of findings results.

I. Sales and Withholding Tax- Best Information Available Assessment

Discussion

The overlying issue for the taxpayer's protest is the audit's assessment of tax based on inferences drawn from taxpayer federal returns and stated gross receipts of taxpayer. Taxpayer argued during the audit that insufficient time was provided for the preparation and presentation of records. Taxpayer now asserts that the passage of time has rendered the task of preparing and presenting the records overwhelming and onerous. The consistent theme throughout has been the request by the Department for source documentation and taxpayer's inability to provide the documentation.

As part of the protest taxpayer did submit additional documentation purporting to demonstrate the over reporting of income for the periods in question. A review of this documentation finds that the summary records provided cannot be reconciled to income as reported on the taxpayer's Federal 1120 returns for the period in question. Additionally, taxpayer documents again break out the service charge from the product cost, contrary to the holding in *Howland v Indiana Department of Revenue*, Indiana Tax Court, 49T10-9611-TA-168, arguing that the court ruled incorrectly on this matter and requesting the department overturn the court's ruling, a procedural impossibility (and absurdity) that the department respectfully declines.

Despite the absence of source documents, taxpayer contends that the inferences resulting in assessment were not properly drawn. This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records in this subsection include *all source documents necessary to determine the tax*, including invoices, register tapes, receipts, and canceled checks. (*Emphasis added*)

Taxpayer does not cite any statute, regulation, or case law for the proposition that the department is required to accept assertions as to the nature of the transactions based solely on taxpayer's assertions. Taxpayer's argument, that the department is required to ignore available source documentation –including federal returns prepared and filed by taxpayer- and give credit for documentation not provided in light of the available source documentation demonstrating taxpayer's intentional misreporting and subsequent underpayment of tax, is not sustainable.

Finding

The taxpayer's protest is denied.

II. Sales and Withholding Tax- Validity of Extension Agreement

Taxpayer argues that an extension of time that was executed by the auditor and taxpayer's representative was invalid due to a clerical error in its preparation. Taxpayer makes much of the fact that the year extended was written as "199" rather than "1992" As stated in the *Indiana Supreme Court D&M Healthcare, Inc. et al., v. Joseph E. Kernan, in his official capacity as Governor of the State of Indiana, et al.*; Indiana Supreme Court, 49S05-0310-CV-437, December 17, 2003, the applicable legal doctrine of "de minimis non curat lex" (the law does not redress trifles) requires a denial of this argument. Inasmuch as the only year at issue for the extension of time was 1992, and that subsequent to the error and after the execution of the extension of time no request was made by the taxpayer for clarification of the issue and the audit for the period at issue was allowed to continue without protest from taxpayer until taxpayer raised the issue during the protest period- well after the time for a new extension to be executed- indicate that the extension, as prepared and executed, was intended and understood and acted upon by both parties as applying to the 1992 period. Taxpayer, having affirmed through his representative a willingness to extend the time for assessment, cannot now assert that a clerical oversight, unobserved, unnoted, and unchallenged by either party at the time, can retroactively reverse this agreement.

Finding

The taxpayer's protest is denied.